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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CUNNINGHAM, Petitioner, **v.** **JOHN MARSHALL, Warden,** Respondent.	07cv2183 DMS (RBB) **ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS**

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CUNNINGHAM, Petitioner, v. **JOHN MARSHALL, Warden,** Respondent.	07cv2183 DMS (RBB) **ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS**

Respondent John Marshall, Warden of the California Men's Colony, San Luis Obispo, California, hereby files this Answer to the Petition for Writ of Habeas Corpus, and admits, denies, and alleges as follows:

1. Petitioner is currently in the custody of Respondent based upon a valid judgment and conviction in San Diego County Superior Court case number SCE243538, after a jury convicted him of assault with a firearm (Cal. Penal Code § 245 (a)(2)); possession of a firearm by a felon (Cal. Penal Code § 12021 (a)(1)); and possession of a deadly weapon (Cal. Penal Code § 12020 (a)(1)), with a true finding that he personally used a firearm during the commission of the assault. (Cal. Penal Code § 12022.5 (a).) Petitioner admitted that he had two prior convictions. (Cal. Penal Code

§ 667 (a)(1) & (b)-(i).) Petitioner was sentenced to twelves years in state prison;

2. Said judgment and sentence are lawful and proper;

3. Petitioner is not entitled to an evidentiary hearing to resolve his claims. Any failure to develop the factual predicate for his claims cannot be excused because Petitioner cannot show: (1) his claims are predicated on a new rule of law with retroactive application; or (2) the factual predicate for his claims could not have been discovered earlier with due diligence; and (3) by clear and convincing evidence no reasonable fact finder would have found Petitioner guilty but for the claimed constitutional errors. 28 U.S.C. § 2254(e)(2);

4. The instant Petition is timely. 28 U.S.C. § 2244(d); and the claims therein are exhausted;

5. Petitioner presents four grounds for relief: in Ground one, Petitioner asserts the trial court committed evidentiary error; in Ground two, Petitioner asserts he was denied his right to confront a witness; in Grounds three and four, Petitioner claims the trial court committed instructional error;

6. Petitioner's claims do not present a federal question; in any event all of Petitioner's claims are meritless;

7. All of Petitioner's claims were rejected by the California courts, whose decisions are entitled to deference because they are not contrary to, nor an unreasonable application of, United States Supreme Court precedent on the facts presented.

8. The relevant facts and procedural history set forth in the accompanying Memorandum of Points and Authorities are incorporated herein by this reference. Except as expressly admitted herein or in the Memorandum of Points and Authorities, Respondent denies each and every allegation of the Petition and specifically denies that Petitioner's confinement is in any way improper, that any condition of Petitioner's confinement is illegal, or that any of his constitutional rights have been or are being violated in any way.

WHEREFORE, for the reasons set forth in this Answer, the Memorandum of Points and Authorities filed in support of this Answer and incorporated herein by this reference, and for such other and further good cause as the Court may find, this Court should deny the Petition, deny all other relief, and deny any request for a certificate of appealability

Dated: February 25, 2008

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

On January 6, 2005, Petitioner was sentenced to twelve years state prison after being convicted of assault with a firearm (Cal. Penal Code § 245 (a)(2)); possession of a firearm by a felon (Cal. Penal Code § 12021 (a)(1)); and possession of a deadly weapon (Cal. Penal Code § 12020 (a)(1)), with a true finding that he personally used a firearm during the commission of the assault. (Cal. Penal Code § 12022.5 (a).) Petitioner admitted that he had two prior convictions. (Cal. Penal Code § 667 (a)(1) & (b)-(i).) (Lodgment 1 at 11, 113, 116.)[1]

On or about September 21, 2005, Petitioner filed an opening brief in the California Court of Appeal, Fourth Appellate District, Division One. (Lodgment 3.) Respondent also filed a brief. (Lodgment 4.) On March 9, 2006, the California Court of Appeal, Fourth Appellate District, Division One, affirmed Petitioner's conviction in case number D046320. (Lodgment 5.)

On or about April 5, 2006, Petitioner filed a petition for review in the California Supreme Court. (Lodgment 6.) On October May 17, 2006, the petition was denied. (Lodgment 7.)

On April 9, 2007, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (Lodgment 8.) On August 22, 2007, the petition was denied, with citations that indicated that the claims therein were procedurally barred. (Lodgment 9.)

On November 13, 2007, Petitioner filed the instant petition.

STATEMENT OF FACTS

On September 12, 2004, in El Cajon, Jose Castro, was present at the apartment of Rebecca and Christopher Knox, helping Christopher pack. At some point, Petitioner came to the apartment and asked Castro, "Where's my vacuum?" Castro replied, "Rebecca's not here." Petitioner said, "I'll be right back." Castro put the vacuum outside on the patio, then went upstairs. (Lodgment 2 at 27-29.)

Sometime later, from downstairs in the parking lot, Petitioner asked Castro, "Where's my

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1. The Clerk's Transcript and the Reporter's Transcripts are lodged herein respectively as items 1 and 2.

cell phone?" Petitioner then said he would be right back. Moments later, Castro was in the living room when Petitioner "busted in the door" holding a short rifle.[2] Petitioner put his hand on the trigger and told Castro, "Where's my cell phone goddamnit? I want my cell phone back. You took my cell phone." Petitioner then placed his gun on Castro's throat. (Lodgment 2 at 30-32.)

Castro tried to grab a nearby telephone so he could call the police. Castro managed to get the phone but Petitioner pushed Castro against the wall with his gun, then grabbed the phone away from Castro and threw it at him. Petitioner told Castro, "Go ahead and call the cops. I'll come back and kill you all." Christopher came out from one of the bedrooms with a baseball bat and told Petitioner to get out of his house. Christopher took the phone, and called the police. (Lodgment 2 at 33.)

Petitioner said, "I'm going to come back and kill you all." Petitioner went downstairs. He continued to yell at Castro and Christopher and said, "I got money. I got machetes. I got my own business. I can do anything I want." As Petitioner walked towards his truck, someone called the police. (Lodgment 2 at 34-36.)

That evening, Rebecca came home and Christopher and Castro told her about the incident with Petitioner. (Lodgment 2 at 69-70.) At some point, while Rebecca was in her living room, Petitioner, holding a gun at his side, came through the front door and started to yell at Castro who was sitting in a chair. Castro and Petitioner yelled at each other about a cell phone and Castro ran to try and get to a phone. Just as Castro went to pick up the phone, Petitioner put his gun on Castro's neck. Petitioner pushed Castro with the gun and caused him to fall back about two or three feet, then Castro fell. Petitioner grabbed the phone and threw it into the hallway. (Lodgment 2 at 70-73, 97.)

Rebecca was scared and thought Petitioner was going to shoot Castro. Christopher came out of his bedroom. He and Petitioner yelled at each other. Christopher went back into the bedroom, grabbed a bat, and yelled at Petitioner to get out of the house. Rebecca also yelled at Petitioner to get out of the house. Christopher picked up the telephone and called 9-1-1. Rebecca took the phone from Christopher. The operator asked her for a description of Petitioner and whether he was still in

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2. Castro identified the gun Petitioner held against his neck. (Lodgment 2 at 98-99.)

the house. By that time, Petitioner had apparently left the apartment. The 9-1-1 operator asked Rebecca to check if Petitioner's car was still around. Rebecca did not see it. At that point, Rebecca was told that another call had been received and Petitioner was on the freeway. Sometime thereafter, the threesome met the police downstairs and their statements were taken. (Lodgment 2 at 74-76.)

Petitioner pointed his gun at Rebecca and Christopher during the incident, and threatened to kill everybody in the apartment. (Lodgment 2 at 95.)

William Bloomfield, a security officer at the apartment complex, was on patrol when he heard people scream, "He has a gun. He has a gun." Bloomfield walked towards the area and saw Petitioner come down the stairs, holding a shotgun. Bloomfield called for assistance, and continued to watch Petitioner. When Petitioner reached his truck, he put his gun inside then turned and said, "It's not over. I'll be coming back for you guys." Thereafter, Petitioner drove away. (Lodgment 2 at 102-107.)

The night of the incident, Nina Talvera, who lived in the complex, awoke to a lot of yelling, screaming, and "cussing." Talvera looked out her window and saw two residents involved in an altercation. Talvera saw Petitioner come down the stairs with something in his hand. Christopher and Petitioner yelled at each other. When Petitioner was "on the ground," Talvera saw that he had something at his side but she could not tell what the item was; it looked like a bat. Talvera heard Christopher tell Petitioner that if he came back he would kill him. Petitioner yelled back at Christopher and raised the item he was holding into the air. Talvera later told the police that Petitioner could have been holding a bat or a shotgun. (Lodgment 2 at 168-170.)

Sometime between 10:00 and 11:00 p.m., El Cajon Police Officer Stephen Paz received a call regarding a disturbance involving a man with a shotgun at 545 North Mollison. The dispatcher described the suspect and his vehicle. Paz responded to the location. On his way to the scene, Paz stopped at a red light. Shortly thereafter, a second patrol car pulled up in the lane next to Paz. As Paz waited for the light to change, a black truck ran the red light to get onto the freeway. Both officers activated their overhead red lights and pursued the truck. As the officers drove onto the freeway, Paz saw something "discharged" out of the passenger window of the truck. The item "sparked" when it hit the ground. (Lodgment 2 at 117-119.)

The officers conducted a traffic stop on the vehicle -- Petitioner was the driver. Petitioner was taken into custody, and Paz retrieved the item he had seen come out of the truck; it was a shotgun. The gun was in pieces but Paz managed to put it back together. There was one bullet inside the gun's chamber and two more inside the gun. (Lodgment 2 at 120-122.)

After Petitioner was transported to the police station, Officer Brian Chase spoke to Petitioner. Petitioner told Chase two things, "that bitch knows she stole that phone and them checks," and "I'm mad because I had to get rid of my strap[3]." (Lodgment 2 at 162-163.) About twenty to twenty-five minutes after the incident was reported, Chase spoke to Castro. Castro told Chase that he had been pushed up against a wall with the barrel of a shotgun placed on his neck. (Lodgment 2 at 166.)

Deborah Teich was the property manager at the apartment complex where Petitioner and the Knox's lived. Sometime after September 12, Petitioner was evicted from his apartment. Before Teich re-rented the apartment previously occupied by Petitioner, she had to remove some items that had been left in the apartment. Teich found two guns in one of the closets and called the police. (Lodgment 2 at 183-184.)

Petitioner testified on his own behalf. Petitioner lived at the Bella Vista Apartment Complex, and he had known Rebecca and Christopher Knox for about one year. Petitioner considered Rebecca a friend. On occasion, Petitioner lent Rebecca money, provided her with transportation, and if she needed a place to stay he let her stay at his house. Petitioner was friendly towards Christopher but later grew angry at him. At times, there were "hostilities" between the two men. (Lodgment 2 at 211-213.) Petitioner did not know Castro. (Lodgment 2 at 216.)

On September 12, 2004, sometime between 10:00 and 10:30 p.m., Petitioner returned home from work and noticed that his daughter's bicycle was missing, and that somebody had "pried" into his screen. Petitioner entered his apartment, and realized his daughter's clothes and his cell phone were missing. Petitioner was "pretty upset about [that]." Some checks were also missing from Petitioner's desk. (Lodgment 2 at 215-218.)

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3. "[S]trap" was a slang word used for firearm. (Lodgment 2 at 163-164.)

Petitioner asked his next door neighbors if they had seen anyone go into his house, and they told him who had been hanging around in front of his house. Petitioner noticed Castro, Rebecca, and some other people on the balcony above so he asked them if they had seen anybody around his apartment. They were "sarcastic" to Petitioner, so he went inside his apartment to "cool down." Shortly thereafter, Petitioner went upstairs to look for Rebecca. (Lodgment 2 at 218-220.)

Petitioner thought his property was upstairs because "they [had] taken things in the past from people over there," and "they would be the first people you would want to contact if something came up missing in the apartments." When Petitioner went upstairs, Castro told Petitioner that Rebecca was not there and that she would be back in about fifteen minutes. Petitioner told Castro, "Tell her I'll be back." Petitioner went to the store. When Petitioner returned, several people were on Rebecca's balcony. Petitioner told Rebecca that he wanted to talk to her. People yelled at Petitioner, so he went inside his house and "armed" himself with his shotgun. Petitioner claimed that he was afraid of Christopher because Christopher had previously threatened him with a baseball bat.[4] (Lodgment 2 at 220-223.)

Petitioner went back upstairs because Rebecca had said, "You can come up in here and look if you want to." Petitioner did not go inside Rebecca's apartment but stood in the doorway. At that point, Christopher came out with a bat. The apartment door started to close. Petitioner did not know what was happening. Petitioner told "them" that he would get back with "them" and said he was going to call the police. Petitioner left, and "they" yelled at him. (Lodgment 2 at 223-224.)

Petitioner denied he hit Castro, or pointed his gun at him. Petitioner did not push Castro down. Petitioner claimed that his gun was at his side when he had stood in the doorway of the Knox's apartment. He denied that he pointed his gun at anyone inside the apartment. Petitioner claimed that when Christopher had threatened him with the bat, Christopher had seen that he, Petitioner, had something in his hand. Christopher asked Petitioner what he had in his hand. Petitioner told Christopher that he had a gun, but he denied that it was pointed at anyone.

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4. Petitioner claimed that, several months prior to this incident, Christopher had threatened him with a baseball bat after he, Petitioner, had confronted Rebecca about a "misdeed" she had done. (Lodgment 2 at 214-215.)

(Lodgment 2 at 224-225.)

Petitioner claimed that after he left the Knox's apartment, as he walked down the stairs, Christopher yelled at him and threatened him. Petitioner admitted that he was angry at that time. Petitioner went to his truck, drove away from the complex, and eventually got onto the freeway. At some point, Petitioner noticed the police were behind him, he saw the lights and sirens. Petitioner admitted that he threw his gun out the window. He did so because he "could have been shot," and he did not want to "subject [him]self to that." Petitioner pulled over and gave himself up to the police. Petitioner admitted that he had other guns in his apartment. (Lodgment 2 at 226-228.)

Petitioner denied that he fled the scene. Rather, he "just left the situation" because he did not want to get arrested. (Lodgment 2 at 257.)

ARGUMENT

I.

STANDARD OF REVIEW FOR FEDERAL PETITIONS AND AEDPA

The Petition is subject to the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Federal habeas corpus lies only to correct violations of the Constitution, law, or treaties of the United States. 28 U.S.C. § 2254; *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991). For petitions filed after April 24, 1996, the "'highly deferential standard'" of AEDPA demands that a federal court give a state court's merit decision "the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 360, 154 L. Ed. 2d 279 (2002), quoting *Lindh v. Murphy*, 521 U.S. 320, 333, 117 S. Ct. 2059, 2068, 138 L. Ed. 2d 481 (1997); 28 U.S.C. § 2254(d). The AEDPA seeks to prevent federal habeas "retrials" and ensures that state court convictions are "given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *see Clark v. Murphy*, 331 F. 3d 1062, 1067 (9th Cir. 2003).

In determining what constitutes "clearly established federal law" for purposes of the deference standard, only United States Supreme Court holdings from the time the state court rendered its decision are controlling, but not dicta or circuit court authority. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Arredondo v. Ortiz*, 365 F. 3d 778 (9th Cir. 2004); *see Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (regarding the "governing legal principle or principles set forth by the Supreme Court"). A decision is "contrary to" United States Supreme Court authority if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but reaches a different result. *Williams,* 529 U.S. at 413-14.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); 28 U.S.C. § 2254(e)(1). A state court's decision "based on a factual determination will not be overturned on factual grounds unless it is objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* at 340; 28 U.S.C. § 2254(d)(2).

This Court identifies the relevant United States Supreme Court authority and then applies that law to the record in the light most favorable to the state court decision. Such an approach embodies the long-standing principle that unarticulated findings that are necessary to the state court's conclusions of mixed questions of fact and law are presumed correct. *See Marshall v. Lonberger*, 459 U.S. 422, 433, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983) (application of presumption to credibility determination which was implicit in rejection of defendant's claim). Anything less deferential would undermine the requirement that federal courts "avoid attributing constitutional error to the state court." *Himes v. Thompson*, 336 F. 3d 848, 854 (9th Cir. 2003). With this standard in mind, this Court should conclude that Petitioner is not entitled to any relief.

All of Petitioner's claims were effectively[5/] presented his opening brief filed in the California Court of Appeal, Fourth Appellate District, Division One, and denied on the merits. (*See* Lodgment 3 & 5.) In reviewing a state court adjudication, a federal habeas court looks to the last reasoned decision as the basis for the state court's final judgment. *Shackleford v. Hubbard*, 234 F. 3d 1072, 1079 n.2 (9th Cir. 2000), *citing Ylst v. Nunnemaker*, 501 U.S. 797, 803-4, 111 S. Ct. 2590,

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5. Petitioner's claims in Grounds one and two amount to a single claim of evidentiary error.

115 L. Ed. 2d 706 (1991). Thus, a federal court may "look through" a summary denial by a state supreme court to a reasoned lower court decision to find the basis for the final judgment. *Id.* However, when there is no state court decision articulating a rationale for the judgment, a federal habeas court "has no basis other than the record" for deciding whether a state court adjudication of a claim was contrary to, or an unreasonable application of, controlling law. *Delgado*, 223 F. 3d 981-2. A federal court must "presume, of course, that state courts 'know and follow the law'[.]" *Himes*, 336 F. 3d at 853.

As discussed below, Petitioner is not entitled to federal habeas relief on any of his claims.

II.

THE STATE COURT'S REJECTION OF PETITIONER'S CLAIMS IN GROUNDS ONE AND TWO WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF SUPREME COURT PRECEDENT

In Grounds one and two, Petitioner claims the trial court committed evidentiary error. (Pet. at 6-7.) The claims are interlocked in that Petitioner claims that the trial court erred in limiting the presentation of impeachment evidence during the cross-examination of a prosecution witness. Thus, Petitioner claims that he was denied his Sixth Amendment right to confrontation.

Federal habeas corpus is available only on behalf of a person in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. at 68; *Engle v. Isaac*, 456 U.S. 107, 119, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). A violation of state law standing alone is not cognizable in federal court on habeas. *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

Habeas relief is not available when a petitioner merely alleges that something in the state proceedings was contrary to general notions of fairness or violated some federal procedural right unless the Constitution or other federal law specifically protects against the alleged unfairness or guarantees the procedural right in state courts. *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985).

Here, Petitioner essentially claims that the trial court failed to properly exercise its discretion under state law, i.e., erred in ruling on the admissibility of evidence. Therefore, this claim does not implicate federal law, and it does not present a federal question. Accordingly, this claim is not cognizable on federal habeas corpus and must be dismissed. *Estelle v. McGuire*, 502 U.S. at 67-68; *see also Johnson v. Sublett*, 63 F.3d 926, 931 (9th Cir. 1995) (state law foundational and admissibility questions raise no federal question).

In any event, the trial court properly limited the admission of impeachment evidence during the cross-examination of Rebecca Knox. Prior to trial, defense counsel sought to introduce evidence that, in 2001, Rebecca had filed a report accusing Christopher of domestic violence. Christopher was arrested. However, Rebecca recanted her statements and the charges were dropped. Defense counsel asserted that the proffered evidence went to Rebecca's "credibility." The prosecutor argued that, because the charges were dropped and Rebecca was not the "particula[r]" victim in this case, the evidence was irrelevant, thus it carried no "weight as far as witness credibility." The prosecutor also pointed out that even though a victim recants on a domestic violence situation, the charges could have been dropped for other reasons. (Lodgment 2 at 12-13.)

The trial court ruled the proffered evidence would be excluded. The court noted the evidence was relevant, but found that the presentation of the evidence would be time consuming and ultimately result in a "trial within a trial." Thus, the relevancy of the evidence was "outweighed by those other factors under [Evidence Code section] 352." (Lodgment 2 at 13.)

In rejecting Petitioner's claim that the trial court erred in the excluding the evidence, the appellate court ruled that the evidence was "marginally relevant to [Rebecca's] credibility." (Lodgment 5 at 10.) The appellate court also noted that any error was harmless in light of the fact that Petitioner was permitted to cross-examine Rebecca "extensively" on other matters bearing on her credibility." (Lodgment 5 at 11.) Thus, for those same reasons, noting that credibility was a collateral issue, the appellate court ruled Petitioner's rights under the Confrontation Clause was not violated by the exclusion of the evidence. (Lodgment 5 at 13-15.) The appellate court's ruling was proper.

It has been established that "trial judges retain wide latitude to limit reasonably a criminal defendant's right to cross-examine a witness based on concerns about, among other things, confusion of the issues, ..." *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S. Ct. 1743, 114 L. Ed. 2d 205

(1991), citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). As seen above, Petitioner was not wholly prevented from attacking Rebecca's credibility. Thus, it cannot be said that Petitioner was prevented from confronting a witness.

Furthermore, Petitioner suffered no prejudice. Based on the overwhelming evidence against Petitioner, it is not likely that the exclusion of the impeachment evidence "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

Consequently, the Court of Appeal's rejection of Petitioner's evidentiary claim was neither contrary to, nor an unreasonable application of, clearly established United States Supreme Court precedent and is entitled to deference.

III.

PETITIONER'S CLAIMS OF INSTRUCTIONAL ERROR IN GROUNDS THREE AND FOUR FAIL TO RAISE A FEDERAL CONSTITUTIONAL QUESTION; IN ANY EVENT, THEY ARE MERITLESS

In Grounds three and four, Petitioner claims the trial court committed instructional error. Both claims must be rejected because they fail to raise a federal constitution question. In any event, they are meritless and were reasonably denied by the California Court of Appeal on direct appeal. Respondent will address both claims of instructional error in this section.

As previously noted, federal habeas corpus is available only on behalf of a person in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. at 67-68. Generally, jury instructions are a matter of state law and do not involve constitutional questions. *Mitchell v. Goldsmith*, 878 F.2d 319, 324 (9th Cir. 1989).

Petitioner's claims of instructional error do not implicate federal law, do not present a federal question, are not cognizable on federal habeas corpus, and must be summarily dismissed. *Estelle v. McGuire*, 502 U.S. at 67-68. In any event, the claims are meritless and were reasonably rejected by the court of appeal.

Petitioner was convicted of, among other crimes, possession of a firearm by a felon (Cal. Penal Code § 12021,(a)(1); count 3). (Lodgment 1 at 111.) Petitioner claims the trial court erred in refusing to submit CALJIC No. 12.50[6] to the jury. (Pet. at 8; Ground three.)

The appellate court rejected this claim. The court of appeal noted that CALJIC No. 12.50 stems from the California Supreme Court's decision in *People v. King*, 22 Cal.3d 12 (1978), which held that section 12021 does not preclude a felon's right to use a concealable firearm in self-defense. (*People v. King*, 22 Cal.3d at 24.) The decision made clear, however, that,

> As in all cases in which deadly force is used or threatened in self-defense, . . . , *the use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available. In the case of a felon defending himself alone, such alternatives may include retreat where other persons would not be required to do so.*

(*Ibid.* at 24, emphasis added.)

The court also pointed out that in order to be entitled to such a self-defense instruction, the defendant's use of a concealable firearm, must be brief, and "without predesign or prior possession of the weapon." (*People v. King*, 22 Cal.3d at 26-27.)

In rejecting Petitioner's claim, the appellate court ruled that based upon the evidence, Petitioner admitted possession of three firearms for a couple of months prior to the incident, Petitioner kept the guns locked in a closet, and "it was undisputed that [Petitioner] armed himself with a firearm prior to being physically threatened by Christopher, and that [Petitioner] left the scene of the incident with a firearm." Therefore, as a felon, Petitioner's need for an immediate use of a weapon due to an imminent threat without prior possession was not established, thus the instruction was not warranted. (Lodgment 5 at 25-26.)

The Court of Appeal's rejection of this claim was reasonable and not contrary to Supreme

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6. CALJIC No. 12.50, Use Of Firearm By Convicted Felon--Self-Defense, provides:
A person previously convicted of a felony does not violate § 12021 of the Penal Code by being in possession of a firearm if:
1. [He] [She] as a reasonable person had grounds for believing and did believe that [he] [she] was [or] [others were] in imminent peril of great bodily harm; and
2. Without preconceived design on [his] [her] part, a firearm was made available to [him] [her];
3. [His] [Her] possession of such firearm was temporary and for a period of time no longer than that in which the necessity or apparent necessity to use it in self-defense continued; and
4. The use of the firearm was reasonable under the circumstances and was resorted to only if no alternative means of avoiding the danger were available.

Court precedent.

Petitioner also claims that the trial court erred in submitting CALJIC No. 2.52 to the jury. (Pet. at 9, Ground four.) CALJIC No. 2.52 states:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which the circumstances is entitled is a matter for you to decide.

(Lodgment 2 at 292; Lodgment 1 at 35.)

In rejecting this claim, the Court of Appeal held that the evidence supported the instruction, and it pointed out that Petitioner "admitted at trial that he left the apartment because he 'didn't want to get arrested.'" Furthermore, it was undisputed that Petitioner left the scene immediately after the incident, then ran one red light during the police pursuit, and he admitted that he threw his shotgun out of his car window during the pursuit. Thus, the jury could have reasonably inferred that Petitioner's flight "reflected consciousness of guilt." (Lodgment 5 at 19.)

The appellate court's rejection of this claim was proper. The giving of CALJIC No. 2.52 has been upheld by several Ninth Circuit cases. *See Karis v. Calderon*, 283 F.3d 1117, 1131-32 (9th Cir. 2002); *Houston v. Roe*, 177 F.3d 901, 910 (9th Cir. 1999) (petitioner failed "to point to any clearly established federal law as determined by the Supreme Court that prohibited giving a flight instruction when the defendant admits committing the act charged"); *McMillan v. Gomez*, 19 F.3d 465, 469 (9th Cir. 1994) (flight instruction proper were "jury was expressly instructed that defendant's flight was evidence of guilt only if defendant's flight were proved").

In any event, any error was harmless. Petitioner has offered no authority which suggests that the omission or admission of any of the instructions violates any federal due process rights. Based on the evidence against Petitioner, it is not likely that the alleged instructional errors, "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. at 623.

The state court decision, that the trial court committed no instructional error, was not contrary to, and did not involve an unreasonable application of, federal law as interpreted by the Supreme Court of the United States. *See Penry v. Johnson*, 532 U.S. 782, 782, 121 S. Ct. 1910, 150

L. Ed. 2d 9 (2001).

CONCLUSION

Accordingly, for the foregoing reasons, Respondent respectfully requests that the instant Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

Dated: February 25, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Cunningham v. Marshall**
No.: **07cv2183 DMS (RBB)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 25, 2008, I served the following documents:
ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS WITH MEMORANDUM OF POINTS AND AUTHORITIES
by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

James H. Cunningham
#V-72323
PO Box 8101
San Luis Obispo, CA 93409

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case: None

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing): James H. Cunningham at the above-named address.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 25, 2008, at San Diego, California.

Anna Herrera	[signature]
Declarant	Signature

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